

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

FLOYD DENNIS CLARK

Claimant

V.

EATON CORPORATION

Respondent

AND

**OLD REPUBLIC INSURANCE CO./
SEDGWICK CLAIMS MANAGEMENT**

Insurance Carrier

Docket No. 1,052,143

ORDER

Respondent requested review of the March 29, 2013 Award. The Board heard oral argument on September 4, 2013. John M. Ostrowski, of Topeka, Kansas, appeared for claimant. P. Kelly Donley, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The Award indicated claimant is entitled to a 50% permanent partial general (work) disability and provided him permanent partial disability benefits not to exceed \$100,000.

The Board has considered the record and adopted the stipulations in the Award.

ISSUES

Respondent argues claimant's current disability is not the direct and natural result of his work injury. Respondent argues claimant sustained an intervening accident which terminated respondent's ongoing liability. Respondent requests the Board modify the Award to reflect a 5% functional impairment. Claimant maintains the Award should be affirmed.

The only issue for the Board's review is: Is claimant entitled to a work disability or is he limited to his functional impairment?

FINDINGS OF FACT

On November 20, 2008, claimant was rolling a drum of sulfuric acid weighing 225 pounds.¹ He lost his balance after tripping on a garden hose. The drum started tipping and claimant injured his low back getting the barrel under control.

Claimant received authorized medical treatment, including pain medication, physical therapy and diagnostic testing, through Drs. Janzen, Young, Yackley, Stein, Sollo and Barrett. On July 9, 2009, Dr. Stein provided him permanent restrictions of:

- no lifting more than 25 pounds with any single lift up to twice per day, 15 pounds occasionally, and 10 pounds more often;
- avoid repetitive lifting from below knuckle height; and
- alternate sitting, standing, and walking occasionally if needed.

Pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.),² Dr. Stein rated claimant's impairment at 5% to the body as a whole based on DRE Lumbosacral Category II.

Aside from a couple of days in the beginning, claimant continued to work his regular duties with some self-imposed modifications to make his job easier. His last date of work was June 14, 2011, when he started vacation leave.

On June 21, 2011, while on vacation, claimant was involved in a motorcycle accident. He sustained a crushed fibula, a broken tibia in four spots, two compression fractures to his vertebrae, a broken collar bone and a bruised brain. He was off work until August 9, 2012, when he was released by Dr. Burr with permanent restrictions of:

- no lifting more than 10 pounds;
- desk work only
- maximum of 10 minutes walking/standing per hour; and
- no squatting, lifting, kneeling.

¹ Claimant's Depo. (Apr. 14, 2011) at 12. Claimant later testified that he believed it weighed 125 pounds. Claimant's Depo. (Nov. 5, 2012) at 6.

² The parties stipulated to Dr. Stein's 5% functional impairment and that if claimant is entitled to a work disability, his current work disability is minimally 50% and entitles him to a maximum Award of \$100,000. "Stipulations and Submission of the Claim by the Parties" (filed February 1, 2013).

Respondent discontinued claimant's job on December 12, 2011. While claimant acknowledged the motorcycle accident was significant, it was his belief it did not change his back condition as his symptoms were the same as what he had experienced between the work injury and motorcycle accident. Claimant testified he felt he could have returned to work in the boiler room after the motorcycle accident within Dr. Burr's permanent restrictions. However, he also testified that he would be unable to return to any of three different jobs offered by respondent when considering either Dr. Stein's restrictions or Dr. Burr's restrictions.³

Claimant was terminated by respondent effective September 29, 2012. Claimant did not seek employment following his termination, and is currently receiving social security disability and long term disability benefits. He continues to experience low back pain daily and sees Dr. Barrett every three months for pain medication.⁴

PRINCIPLES OF LAW

K.S.A. 44-510e(a) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

³ Claimant's Depo. (Nov. 5, 2012) at 17-18, 30-31.

⁴ The parties stipulated that claimant is entitled to future medical treatment with Sandra Barrett, M.D. "Stipulations and Submission of the Claim by the Parties" (filed February 1, 2013).

ANALYSIS

Respondent argues claimant's disability is not due to his accidental work injury, but is rather due to an intervening motorcycle accident, such that claimant is limited to an Award based on his 5% functional impairment. Claimant argues that *Bergstrom*⁵ and its progeny support a 50% work disability based on 0% task loss and 100% wage loss.

Bergstrom allows injured workers who have whole body impairment and at least 10% wage loss to get work disability awards regardless of why they have wage loss and without any consideration whether they mitigate against damages.

Before *Bergstrom* and since 1995, case law required claimants to exercise good-faith in maintaining or seeking appropriate post-injury employment. Allowing an injured worker to merely sit at home, refuse to work and take advantage of the workers compensation system was deemed absurd by the Kansas Court of Appeals in *Foulk*.⁶ A claimant terminated for cause would not receive a work disability award. Claimants who failed to make good-faith attempts to mitigate damages could have their awards decreased based on their earning capacity.

Bergstrom held that the statute concerning work disability, K.S.A. 44-501e, contained no requirement that a claimant make a good-faith effort to seek post-injury employment. *Bergstrom* mandates that work disability be awarded whenever a claimant with a non-scheduled injury earns less than 90% of his or her pre-injury wage.

Citing *Bergstrom*, the Kansas Court of Appeals ruled in *Tyler*⁷ that there need not be any nexus between an injury and a work disability award. In *Tyler*, the injured worker's wages dropped due to a union contract that restructured his work week. The Appeals Board denied a work disability award on the basis that the Kansas Workers Compensation Act requires a nexus between a work injury and task loss. The Court of Appeals reversed, awarding Tyler a work disability despite his wage loss having nothing to do with his injury.

The *Tyler* Court noted:

[W]hile the Board's reasoning is arguably sound regarding the purpose of the Workers Compensation Act, the Board's decision nonetheless is foreclosed by our Supreme Court's rulings in *Casco*, *Graham*, and *Bergstrom*. These cases make a number of points clear:

⁵ *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

⁶ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), disapproved of by *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

⁷ *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 224 P.3d 1197, 1200 (2010).

- K.S.A. 44–510e(a) is a simple mathematical calculation;
- Judicial notions regarding the legislature's intent in the enactment of K.S.A. 44–510e(a) are not favored; and
- Judicial blacksmithing will be rejected even if such judicial interpretations have been judicially implied to further the perceived legislative intent.⁸

Numerous appellate cases follow *Bergstrom*, as follows:⁹

- *Fernandez v. McDonald's*, 296 Kan. 472, 292 P.3d 311 (2013) (illegal immigrant/undocumented worker granted work disability);
- *Goss v. Century Manufacturing, Inc.*, No. 108,367, 303 P.3d 1278 (Kansas Court of Appeals unpublished opinion dated July 26, 2013, *rev. denied* Sep. 4, 2013) (incarcerated claimant's work disability award proper even though his wage loss was due to private business ceasing operations within prison);
- *Chambers v. Wesley Medical Center*, No. 107,350, 291 P.3d 105 (Kansas Court of Appeals unpublished opinion dated Dec. 21, 2012) (claimant was awarded work disability after simply quitting accommodated work);¹⁰
- *Smith v. Hy-Vee Food Stores*, No. 105,911, 264 P.3d 1060 (Kansas Court of Appeals unpublished opinion dated Dec. 16, 2011, *rev. denied* Feb. 4, 2013) (whether claimant voluntarily resigned or was forced to quit was legally immaterial to work disability award);

⁸ *Id.* at 391.

⁹ A case that may be directly on point is *Amador v. National Beef Packing Co.*, No. 107,315, 286 P.3d 576 (Kansas Court of Appeals unpublished opinion dated Oct. 12, 2012, *petition for review filed* Nov. 9, 2012). In *Amador*, the claimant acknowledged her wage loss was due to intervening motor vehicle accident, but she was nonetheless entitled to work disability award. "[B]ecause there is no statutorily required nexus between Amador's compensable injury and her wage loss, no intervening cause can cut off her eligibility for work disability. *Bergstrom* controls this case, and the Board did not err in finding that Amador was eligible for work disability notwithstanding the reasons for her wage loss." However, Kansas Supreme Court rule 8.03(i) states the timely filing of a petition for review stays the Court of Appeals' ruling. Pending the Supreme Court's determination on the petition for review, or the Supreme Court ruling on the case based on the merits, *Amador* is not binding and, while noted, does not impact the Board's ruling.

¹⁰ See also *Kennedy v. City of Wichita*, No. 1,041,314, 2010 WL 2671471 (Kan. WCAB June 25, 2010) (claimant awarded work disability after voluntarily quitting after dispute with supervisor); *Lewis v. M & M Moulders*, No. 1,022,029, 2010 WL 1918566 (Kan. WCAB Apr. 8, 2010) (worker voluntarily resigned from accommodated position entitled to a work disability award; "[t]he reasons behind the job loss are irrelevant").

- *Criswell v. U.S.D.* 497, No. 104,517, 263 P.3d 222 (Kansas Court of Appeals unpublished opinion dated Nov. 10, 2011) *rev. denied* (Feb. 4, 2013) (high school custodian was terminated for cause (placing a balloon and flowers in a student's locker), but his wage loss was unrelated to his injury and he was entitled to a work disability award);
- *Serratos v. Cessna Aircraft Co.*, No. 104,106, 253 P.3d 798 (Kansas Court of Appeals unpublished opinion dated July 1, 2011) (employee terminated for cause – poor attendance – was still entitled to a work disability award);
- *Butler v. Cessna Aircraft Co.*, No. 103,965, 252 P.3d 647 (Kansas Court of Appeals unpublished opinion dated June 3, 2011) (claimant entitled to receive a work disability award even though his employment was terminated for cause - falsifying an employment application);¹¹
- *Osborn v. U.S.D.* 450, No. 102,674, 242 P.3d 1281 (Kansas Court of Appeals unpublished opinion dated Nov. 12, 2010) (“[W]hile appellees’ contention that Osborn must prove a causal connection between the injury and the wage loss seems reasonable, it is contrary to the holding in *Bergstrom*.”);
- *Lewis v. Sun Graphics, Inc.*, No. 103,277, 237 P.3d 1272 (Kansas Court of Appeals unpublished opinion dated Sep. 3, 2010, *motion for reh’g or modification denied* Oct. 5, 2010) (claimant eligible for work-disability award even when his wage loss was due to his employment being terminated following an unrelated and subsequent injury); and
- *Killough v. Goodyear Tire & Rubber Co.*, No. 103,321, 252 P.3d 646 (Kansas Court of Appeals unpublished opinion dated May 27, 2011) (“Therefore, in light of *Tyler* and rejection elsewhere of other judicially created hurdles to workers-compensation benefits, we conclude that the Board was correct in awarding Killough work disability regardless of whether his wage loss was caused by his injury at Goodyear.”).

¹¹ See also *Bowman v. Wesley Medical Center, LLC*, No. 1,039,638, 2009 WL 3710745 (Kan. WCAB Oct. 14, 2009) (while injured nurse was found by the judge to have been terminated for falsifying medical records, an allegation claimant contested, the Board awarded a substantial work disability under *Bergstrom*, noting the law does not provide any defense where a claimant is terminated due to misconduct or for cause); *Fulton v. Haysville Health Care Center*, No. 1,041,145, 2010 WL 1918578 (Kan. WCAB Apr. 30, 2010) (worker who was fired for cause – absences secondary to unrelated tooth pain – was nonetheless entitled to work disability award).

Despite protests that *Bergstrom* leads to inequitable results, it remains the law, without any judicially-created exceptions. *Bergstrom* “does not ask why” a claimant has wage loss¹² and has “no concern” over the reason for a claimant’s wage loss.¹³ “[R]easons behind the claimant’s job loss are irrelevant.”¹⁴ Arguably, *Bergstrom* would allow workers fired for illegal acts to nonetheless receive work disability awards.¹⁵ The *Bergstrom* decision could not be clearer on how to interpret and apply the work disability statute.

AWARD

WHEREFORE, the Board affirms the March 29, 2013 Award.

IT IS SO ORDERED.

Dated this _____ day of September, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John M. Ostrowski
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¹² *Serratos v. Cessna Aircraft Co.*, No. 1,024,584, 2010 WL 1445593 (Kan. WCAB Mar. 25, 2010).

¹³ *Somrak v. Akal Security*, No. 1,026,000, 2010 WL 1445595 (Kan. WCAB Mar. 22, 2010).

¹⁴ *Reyes v. Centimark Corporation*, No. 1,007,295, 2010 WL 1445590 (Kan. WCAB Mar. 8, 2010).

¹⁵ *Van Holland v. CSU, LLC*, No. 1,040,931, 2009 WL 5385891 (Kan. WCAB Dec. 21, 2009).